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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a), upon written consent of all parties, Cargill, Incorporated, The Pillsbury Company, Uniden Financial, Inc. and Xerox Corporation respectfully submit this brief *amicus curiae* in support of respondent The Mead Corporation's ("Mead") brief.

INTERESTS OF *AMICUS CURIAE**

Xerox Corporation is a publicly traded corporation with its shares listed on the New York Stock Exchange. The Pillsbury Company is owned by General Mills, Inc., a publicly traded corporation with its shares listed on the New York Stock Exchange. Cargill, Incorporated and Uniden Financial, Inc. are privately held corporations. Each of these *amici* has, in the past, received rulings from the United States Customs Service ("Customs"). In addition, each has filed civil actions in the United States Court of International Trade to challenge Customs decisions. The decision of this Court in this appeal will directly affect *amici's* decisions on whether to seek rulings from Customs concerning the classification of their merchandise.

STATEMENT

This case presents the issue of whether Customs

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* Counsel for the parties have consented to the filing of this amicus brief, and the letters of consent are being filed with this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than the listed *amici* made a monetary contribution to the preparation or submission of this brief.

classification rulings that are issued without public notice and comment are entitled to deference, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), by courts that consider challenges to such rulings under a *de novo* scope of review.

SUMMARY OF ARGUMENT

The Administrative Procedure Act distinguishes "legislative" regulations, that result from notice and comment rulemaking, from other forms of agency action. This Court has provided a high degree of judicial deference to validly adopted legislative regulations and agency interpretations of them. On the other hand, agency pronouncements, such as interpretive rulings, that are not the result of notice and comment rulemaking have not been given deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and subsequent cases.

Judicial challenges to Customs classification decisions, including decisions concerning import transactions where a ruling was previously issued, are subject to review *de novo* by the Court of International Trade. That Court's predecessor's longstanding interpretation of its *de novo* authority to preclude deference to underlying administrative decisions challenged under "protest" jurisdiction was known to Congress at the time the Customs Courts Act of 1980 was under legislative consideration. The legislative history of that Act explicitly states that it "restates existing law," indicating Congressional approbation of the lower court's application of its *de novo* authority. Moreover, the lower court's interpretation comports with this Court's directives concerning the scope of *de novo* review.

Tariff classification questions generally involve determination of the common and/or commercial meaning of

words in the tariff. Customs has no special expertise in making such determinations, and, to the contrary, this Court has stated that the interpretation of words in the tariff involves judicial knowledge. In these circumstances, deference to the agency's interpretation is unwarranted.

Customs rulings are nothing more than statements of agency enforcement intent, and have not undergone the rigors of public notice and comment. Their quality is inconsistent at best, perhaps because of the huge number of rulings issued annually by Customs and the absence of a mechanism for central review of them. Moreover, there is no official publication in which all Customs rulings are published, Customs has failed to revoke numerous rulings despite judicial decisions to the contrary, and the effect of rulings is limited to the specific requesting importer and the specific transaction described in the request. In these circumstances, *Chevron*-style deference to Customs rulings is inappropriate.

ARGUMENT

I. Informal Agency Interpretations, Such As Customs Rulings, Are Not Entitled to *Chevron* Deference

Because Customs rulings are not the product of "notice and comment" rulemaking, they do not constitute an exercise of delegated legislative authority, and are not owed judicial deference. The Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), distinguishes between "legislative" regulations which must be promulgated following published notice and opportunity for comment, and "interpretative rules, general statements of policy or rules of agency organization, procedure and practice", which do not require formal rulemaking under the APA.

This Court has required greater judicial deference to legislative regulations than to other forms of agency action,

acknowledging the more stringent and formalized process which Congress has prescribed for the adoption of legislative rules. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 300 (1979)("*Chrysler*"), the Court wrote that:

> The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice on the other". . . . in *Morton v. Ruiz*, 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule - or a "legislative -type rule", *Id.*, at 236 - as one "affecting individual rights and obligations." *Id.*, at 232. This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law." *Id.* at 235, 236.

Footnote omitted. The Court in *Chrysler* spelled out the consequences of this distinction:

> As we observed in *Batterton v. Francis*, 432 U.S., at 425 n.9: "[A] court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." . . . "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as giving a regulation the binding

> effect of law."

Chrysler Corp., 441 U.S. at 315 (footnotes omitted).

More recent cases have affirmed *Chrysler's* distinction between legislative regulations and other forms of agency interpretation. *Christensen v. Harris County*, 120 S.Ct. 1655, 1662 (2000)("*Christensen*") explicitly distinguished administrative interpretations "arrived at, for example, after a formal adjudication or notice-and-comment rulemaking" from "[i]nterpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law" and therefore "do not warrant *Chevron*-style deference." *Christensen*, relied on similar conclusions in recent cases:

> *See, e.g., Reno v. Koray*, 515 U.S. 50, 61 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers").

Id. at 1663. This most recent iteration of the legislative regulation-interpretive rule distinction reflects the Court's longstanding jurisprudence. *See also, United States v.*

Haggar Apparel Company, 526 U.S. 380, 386 (1999)(noting adoption of regulation following notice and comment rulemaking); *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995) (relying on *Chrysler* to distinguish interpretive rules, which "do not have the force and effect of law," from notice and comment rulemaking).

Petitioner asserts that "interpretive" Customs rulings are entitled to *Chevron*-type deference. (Pet'r Br. at 20, 21, 23). This argument is premised solely on a claim that Customs' ruling program is statutorily authorized, under 19 U.S.C. § 1502(a), and, therefore, any interpretive ruling issued under such a scheme deserves the same judicial deference as an agency regulation, even though such rulings are not issued pursuant to notice and comment rulemaking procedures. However, the government's argument misinterprets precedent, and draws a distinction that neither appears in this Court's decisions nor makes sense in light of the deficiencies in Customs' classification ruling program. Furthermore, the government incorrectly interprets 19 U.S.C. § 1502(c), which merely authorizes a regulatory rulemaking program, as conferring Congressional approval on the contents of the rulings themselves.

The government seizes on *Christensen's* general reference to K. Davis and R. Pierce, *Administrative Law Treatise*, 120 S.Ct. at 1663, as its sole authority for the notion that this Court has required *Chevron*-style deference for agency rulings issued under a grant of statutory authority. As even the government recognizes (Pet'r Br. at 28 n.1), the Court did not use the Treatise's language in its opinion. Nor is there any implication in *Christensen* that its "see generally" reference to the Treatise implied the otherwise unheralded adoption of a novel theory that accords interpretive rulings the same deference as legislative regulations.

In fact, the Treatise *rejects the very proposition that the government asserts.* The authors state that *Chevron* "should not be held to apply to agency pronouncements in

less formal formats [than legislative regulations], e.g., manuals, letters, guidelines, interpretative rules, or litigating positions." *Administrative Law Treatise* 3d ed. 1994 at 119. Further, the Treatise recognizes that the "format" established by Congress to warrant deference is the legislative regulation adoption process of the APA. Contrary to the government's assertion, the Treatise categorically rejects the notion that administrative action that falls short of formal legislative-type rulemaking should receive *Chevron* deference.

The government's mischaracterization simply ignores the distinction actually drawn in *Christensen*, and the cases cited therein, between notice-and-comment rulemaking and other, less rigorous formats for agency interpretations. Although Customs classification rulings are issued under a statutorily-authorized program, Congress has provided no standards for the issuances of rulings; Customs rulings are not the product of notice or comment, nor are they published in the *Federal Register* or any other official document. This distinguishes them from legislative-type regulations. The Court has recognized that it is the APA's stringent process for legislative-type rulemaking that warrants judicial deference to regulations. Customs rulings, however, are nothing more than interpretative rules, opinion letters, and other interpretations that are not "'subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment'" and hence do not merit *Chevron* deference. *Christensen*, 120 S.Ct. at 1663, quoting *Reno v. Koray*, 515 U.S. at 61. Likewise, the government's "formal/informal" ruling distinction is entirely its own creation. The only formal proceedings referenced in *Christensen* were those involved in "formal adjudication or notice-and-comment rulemaking." Whether or not an interpretive ruling is issued under a statutorily-authorized ruling program, its issuance lacks the rigorous procedures that Congress has mandated for "legislative" type rules.

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980)("*Ford*") does not support the government's claim for

judicial deference to non-legislative rulings. In *Ford*, a creditor asserted a defense grounded in reliance on a Federal Reserve Board staff interpretation of an agency regulation and the underlying statute. The staff interpretation was published in the Code of Federal Regulations and the statute expressly permitted creditors to assert their reliance on such interpretations as a defense against liability. The Court found in the statutory scheme a Congressional intent that Board interpretations be considered "authoritative," and thus accorded the published interpretation the deference traditionally shown to an agency's construction of its own, "highly technical" regulations.

Customs rulings, by contrast, display none of the attributes of the staff interpretation involved in *Ford*. As noted *infra*, reliance by private parties on Customs rulings is not permitted (as in *Ford*), but sharply limited. Customs rulings are not published in the *Customs Bulletin*, much less the Code of Federal Regulations. Moreover, there is no statutory indication that Congress intended Customs rulings to be "authoritative."[1]

In *United States v. Correll et ux.*, 389 U.S. 299 (1967)("*Correll*"), the Court reviewed the deference to be paid to a rule defining "sleep or rest" issued by the

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[1]The government's citation to *Martin v. Occupational Safety & Health Review Comm'n* ("*Martin*") is unavailing, as that case concerned an agency's interpretation of its own validly-promulgated regulation rather than an interpretive ruling. Similarly, the "formally adopted 'guidelines'" that warranted deference in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975)("*Train*"), were set forth in a legislative regulation, 421 U.S. at 70 and note 7. Thus, the question in *Train* was whether the agency's validly-promulgated regulations conformed with the statute, and the case did not involve any form of interpretive rule. Additionally, the Court held that "the Agency's interpretation" of the statute as reflected in the regulation "was 'correct,'" 421 U.S. at 87. Contrary to the government's argument, *Martin* and *Train* do not address the question of deference for interpretive rules, much less establish that such deference is due.

Commissioner of Internal Revenue. The Court of Appeals for the Sixth Circuit found that the Commissioner's rule was not "a valid regulation under the present statute." This Court reversed, finding that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Id.* at 305-306 citing *Helvering v. Winmill*, 305 U.S. 79, 83; *Fribourg Nav. Co. v. Commissioner*, 383 U.S. 272, 283.

The differences between the "sleep or rest" rule reviewed in *Correll* and Customs rulings are readily apparent. The IRS rule in *Correll*, intended to have broad applicability to a wide range of persons, was in the same category as a legislative regulation. Customs rulings, by contrast, simply make conclusions that are limited to narrow facts presented in the ruling request, and are not intended to bind the public or furnish guidance to anyone other than the ruling's recipient. Moreover, the *Correll* case involved a longstanding, uniform and general interpretation of a statute which had been re-enacted or otherwise amended in a manner suggesting specific Congressional acceptance and approval of the interpretation. Such is not the case here.

In *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)("*NLRB*"), the Court reviewed an NLRB determination. As petitioner pointed out, the Court found that the agency's determination was "to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.* at 131. What the petitioner did not provide was that the NLRB's determination was a record compiled before the agency by means of fact-finding, investigation and hearings, reviewable by the court. Customs ruling procedures contain no mechanism for gathering facts beyond those set out in the importer's ruling request, nor for compiling a formal administrative record which a court might consult or review.

Petitioner's reliance on *Zenith Radio Corp. v. United*

States, 437 U.S. 443 (1978), is similarly misplaced. In *Zenith*, the Court found that the Treasury Department's interpretation of the countervailing duty statute was to be afforded deference. However, the determination under review in *Zenith* was the product of a detailed administrative investigation which provided for the compilation of a record, public comment and hearings, and notice of the final determination was published in the *Federal Register*. Customs' rulings process lacks any of these procedural safeguards.

The statute on which the government places primary reliance, 19 U.S.C. § 1502(a), authorizes the Secretary of the Treasury to use various means to administer the Customs laws, including the promulgation of "rules and regulations," the issuance of pre-importation "rulings" and the dissemination of "information," as necessary. The Secretary's latitude in selecting the administrative tool for a particular purpose is not unfettered, but is rather limited by law. Nothing in 19 U.S.C. § 1502(a) suggests in any way that the Secretary has been freed from the requirement that a rule having the force and effect of law be promulgated through formal APA "notice and comment" rulemaking. *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *see also*, *American Frozen Food Inst. v. United States*, 855 F. Supp. 388 (Ct. Int'l Trade 1994)(Customs' "interpretive" country of origin marking ruling found to be a substantive "rule" requiring APA notice and comment prior to adoption). The government is here attempting to impose new rights and duties -- including a judicial duty of *Chevron* deference -- while bypassing the APA rulemaking procedures which Congress has prescribed for rules having such legislative effect.

Customs has issued APA-type legislative rules which incorporate legal interpretations, and these rightly command *Chevron* deference. *See*, *e.g.*, 19 C.F.R. Parts 10 (classification of goods under duty-free provisions), 152 (classification and appraisement of merchandise), 191 (duty

drawback). To grant deference to agency rulings which are not forged in the crucible of APA rulemaking procedures would weaken the APA and encourage agencies to circumvent it.

Chevron deference is grounded in the notion that Congress has delegated rulemaking power to be exercised by the agency. Congressional delegations, however, are not unrestricted, but are expressly conditioned on the agency's use of APA rulemaking. Where an agency has not followed Congress' prescribed path for exercising legislative power, judicial deference to the agency's action is unwarranted.

II. The *De Novo* Scope of Judicial Review of Customs Decisions Precludes Deference to Classification Rulings

The scope of judicial review in Customs classification cases[2] is set forth at 28 U.S.C. § 2640(a)(1), which provides that:

> (a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:
>
> (1) Civil actions contesting the denial of a protest under

[2]Section 2640(a)(1) applies to cases that involve a denied protest, such as *Mead*. The statute requires that an importer first file a protest against an adverse Customs Service decision and, if its protest is denied, file a lawsuit in the Court of International Trade. 19 U.S.C. §§ 1514, 1515; 28 U.S.C. § 1581(a). The importer must follow this procedure regardless of whether Customs has issued a ruling concerning its merchandise; the decision that is on appeal is the protest denial, not the ruling (if any). In narrow circumstances, rulings may be the subject of pre-importation review on an administrative record outside the protest procedure, pursuant to 28 U.S.C. § 1581(h).

section 515 of the Tariff Act of 1930.

Pursuant to this directive, the court conducts a *de novo* proceeding, and may hold a trial for independent fact gathering. *Amity Leather Co. v. United States*, 20 Ct. Int'l Trade 1049, 1052, 939 F. Supp. 891, 894 (1996); *Customs Courts Act of 1980*, H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 59 ("[s]ubsection [2640](a)(1) provides for a trial *de novo* in the Court of International Trade in a civil action commenced pursuant to section 515 of the Tariff Act of 1930. This provision restates existing law").

Under the *de novo* review that was recodified in the 1980 Act, and which had obtained in previous decades, the courts provided no deference to Customs decisions denying protests, or to any rulings that may have underlain those decisions.[3] For example, in *C.J. Tower & Sons v. United States*, 33 Cust. Ct. 14, 17 (1954), the Customs Court, predecessor to the Court of International Trade, noted that:

> . . . the court's province is the construction of the tariff laws in the light of the intent of Congress in writing same . . . . The courts are not influenced by the interpretative rulings made for the guidance of Customs officers. But rather, the courts, as amply demonstrated in a long line of decisions, have been called upon to consider the legality of the acts of Customs officials.

Shortly thereafter — in the same year that the legislation that would become the Customs Courts Act of 1980 was introduced — the Customs Court issued a decision

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[3]Until 1980, the Customs Court's jurisdiction was premised exclusively on denial of a protest against a decision of the Customs Service.

explaining why it did not give deference to administrative determinations. *Michelin Tire Corp. v. United States*, 469 F. Supp. 270 (Cust. Ct. 1979)("*Michelin*"), involved a challenge to Customs' denial of an importer's protest against collection of countervailing duties pursuant to a Treasury Department determination.

The *Michelin* decision rejected the government's contention that the judicial role was limited to review on the agency record, or that any form of deference to the agency's legal conclusions was warranted:

> The court concludes that, within the subject matter jurisdiction granted to it by Congress, it is the *exclusive, unlimited and unrestricted forum for the determination of all issues of fact and law.* Its powers are unaffected by the manner in which some issues may have been decided on the administrative level.

469 F. Supp. at 274. [Emphasis added]. Specifically discussing actions commenced to challenge protest denials under 19 U.S.C. § 1514, the court noted that:

> This provision . . . does not contain any exclusions which would limit the inherent power of the court to decide all issues of fact and law before it. Moreover, § 1514(a) explicitly makes the legality of "all orders and decisions entering into the [decisions of the appropriate Customs officer]" subject to a civil action commenced in this court.

Id. at 280 (bracketed text in original). Accordingly, the court declined to "review" Treasury's decision under the limited and deferential APA standards, holding that the statutory directive for a civil action to be conducted *de novo* precluded the notion that limited APA review was even permissible.

Id. at 276, citing *Chandler v. Roudebush*, 425 U.S. 840 (1976).

The *Michelin* court's explication of its authority received implicit Congressional approbation in the *Customs Courts Act of 1980*. Although that Act created a new form of action for the review of countervailing duty determinations on the agency record, according to a deferential standard, it made no changes to the scope of review in protest denial cases. Indeed, the legislative history admonished that the *Customs Courts Act's* protest jurisdiction provision "restates existing law." H.R. Rep. No. 96-1235 at 59.

Congress was well aware of the *Michelin* decision at the time the *Customs Courts Act* was enacted. The legislative history for the *Trade Agreements Act of 1979*, in discussing changes in the scope and standard for judicial review of countervailing duty determinations, stated:

> The Treasury Department has consistently asserted that antidumping and countervailing duty determinations, unlike traditional value and classification decisions, are not subject to *de novo* review. A reading of the two recent countervailing duty decisions in the Customs Court relating to investigations of float glass from Italy and X-belted radial tires (Michelin) from Canada indicates that some differences of opinion exist with respect to the issue.
>
> Section 516A (codified at 19 U.S.C. § 1516a) would remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations.

Trade Agreements Act of 1979, S. Rep. No. 96-249, 96th Cong., 1St Sess. 251 (1979). Thus, the legislation removed

countervailing duty determinations from *de novo* review, but in no way disagreed with *Michelin's* conclusions regarding the breadth of the Customs Court's authority.

The *Customs Courts Act* and *Trade Agreements Act* should be read *in pari materia* and the drafters of the former should be considered aware of the latter's discussion of *Michelin*, as it related to an issue that was relevant in both pieces of legislation. Thus, the directive that then-new 28 U.S.C. § 2640(a) "restates existing law" had in its background Congressional awareness of *Michelin's* description of *de novo* authority as precluding deference to agency interpretive rulings.[4]

The analysis in *Michelin* comports with this Court's jurisprudence concerning the proper application of *de novo* review to a challenged administrative determination. For example, in *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991), the Court concluded that "[w]hen *de novo* review is compelled, no form of appellate deference is acceptable." In *Costarelli v. Massachusetts*, 421 U.S. 193,

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[4]The Court of International Trade is also charged by Congress with the duty to find the *correct* result in cases involving the classification of imported merchandise. See 28 U.S.C. § 2643(b), The Court of Appeals for the Federal Circuit ("CAFC"), has construed this mandate to mean that the it is the duty of the CIT to find the correct classification of imported merchandise regardless of Customs' position. *Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984) "[t]he trial court . . . must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. . . . The court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Id.* at 878. While the CIT must accord a presumption of correctness to Customs' decision, 28 U.S.C. § 2639(a)(1), the legal determination embodied in the ultimate question in a classification case rests solely with the CIT. As the CAFC found, "our agreement with the opinion of the CIT does not extend to the suggestion that a routine classification dispute is entitled to special deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Crystal Clear Industries v. United States*, 44 F.3d 1001, 1003 n.8 (Fed. Cir. 1995).

199 (1975)("*Costarelli*"), the Court rejected deference to a lower tribunal's legal conclusions as inconsistent with an action *de novo*: "Here, on the contrary, the review is not circumscribed so as to be narrower than normal appellate-type review on the record made in an inferior court, but is instead so broad as to permit de novo relitigation of all aspects of the offense charged, whether they be factual or legal." Although *Costarelli* concerned trial of a criminal matter in state court, the breadth of its definition of *de novo* review is equally applicable to Customs classification cases before the Court of International Trade.

Further evidence that Congress meant for *de novo* review in protest cases to preclude deference to Customs' legal interpretations may be gleaned by comparing 28 U.S.C. §§ 1581(a) and 2640(a) with 28 U.S.C. §§ 1581(h) and 2640(e). The former two provisions vest the Court of International Trade with jurisdiction over traditional protest denial actions, prescribing *de novo* review. The latter statutes address a new type of pre-importation judicial review of Customs rulings, which is available only in exceptional circumstances, and which requires the Court to review rulings on the basis of the administrative record, using a standard of review borrowed from the APA. *See* 5 U.S.C. § 706(2)(A). That Congress provided for a deferential standard of review in direct challenges to pre-importation rulings, but affirmed the historically non-deferential judicial review of protest cases, suggests powerfully that Congress deliberately withheld a preferential standard of review to protest actions.

In *United States v. First City Nat'l Bank*, 386 U.S. 361, 368-364 (1967)("*First City*"), the Court contrasted *de novo* proceedings with those limited to the agency record, and held that deference to agency views is inappropriate in the former.

> The critical words seem to us to be "de novo" and "issues presented." They mean to us that the court should make an independent

> determination of the issues. . . . But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal.

The Court contrasted non-deferential proceedings under the *de novo* scope with the far more circumscribed "arbitrary, capricious or abuse of discretion" standard and indicated that Congress well understood the difference between the two when it passed the act in question.

The *Customs Courts Act of 1980* provided a similar dichotomy between section 1581(a) and 1581(h) cases. The novelty of direct review of a ruling occasioned extensive commentary in the legislative history, leaving no doubt that Congress was aware of the situation when it adopted section 1581(h). The government's position is that the two standards are indistinguishable, so that Customs rulings receive the same treatment in both *de novo* and "arbitrary, capricious and abuse of discretion" proceedings. As the *First City* decision provides, however, the two are very different, and the government's position would impermissibly conflate them. That Congress provided limited pre-importation review for rulings under 28 U.S.C. § 1581(h), while preserving the traditional non-deferential standard for traditional protest cases, strongly suggests that no deference is due Customs' decision in the instant "protest" case.

According traditional non-deferential *de novo* review to Customs classifications in "protest" cases is perfectly consistent with this Court's decision in *Haggar*, which held that *de novo* proceedings must take place against the backdrop of "controlling statutes, rules, and judicial precedents." *Haggar* at 391. *Haggar* involved a validly-promulgated "legislative" regulation, which had the force and effect of law. *See, Chrysler Corp. v. Brown*, 441 U.S. at 315-316. This case, in marked contrast, involves an agency interpretation that necessarily involved fact findings and legal conclusions and is subject to *de novo* challenge. In

quoting from Justice Scalia's statement that *de novo* proceedings are inconsistent with *Chevron*-style deference, *Haggar* recognized the continued distinction between *de novo* review and review on the agency record. *Haggar* at 391, quoting Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-516.

Thus, in *Haggar's* terms, the Customs ruling is not part of the "legal norms" to which a court must give effect. Rather, the court must determine the legality of the position set forth in the ruling itself in light of the applicable legal norms.

III. Deference To a Ruling Is Inconsistent With Proper Judicial Interpretation of the Tariff

It is a longstanding principle in classification cases that tariff provisions must be construed according to their common and commercial meanings, which are presumed to be the same. *See, United States v. Stone & Downer Co.*, 274 U.S. 225, 249 (1927). Common meaning is an issue of law, and its touchstones the subject of judicial knowledge; the courts routinely consult treatises and lexicons, and receive advisory expert testimony to guide their decisions.

Some classification determinations turn on the use to which a class or kind of goods is principally put. Similarly, in *Sonn v. Magone*, 159 U.S. 417, 421 (1895), the Court found that a product's "ordinary use, not occasional or subsequent use, furnishes the guide for classification." (Citations omitted). Moreover, the Court held, it was the judiciary's role to make the factual determination of what the "use" was:

> Whether the articles were properly classified as vegetables was a matter for the court to decide. The interpretation of words of common speech is within the judicial knowledge and matter of law.

Id. (Citations omitted).

Deference is generally accorded where an agency has a Congressionally-recognized expertise in a given subject area, or is called upon to make policy choices. However, tariff classification cases involve neither matters in which Customs has special expertise, nor matters of policy. The Harmonized Tariff Schedule of the United States ("HTSUS") is an enumeration of all physical objects, animate or inanimate, known to mankind. To suggest that Customs has special expertise in all matters of science and commerce germane to all of the items covered by the HTSUS is nonsensical; indeed, Customs has neither demonstrated nor claimed any special expertise with respect to the "diaries" which are the subject of the instant case. Classification of goods under the HTSUS involves no policy choices commended to agency discretion. Rather, classification is purely an exercise of statutory construction, performed according to empirical rules set forth in the General Rules of Interpretation of the tariff, the terms of the headings and any relative Section and Chapter Notes. Doubtful or difficult cases are often resolved by resort to judicially-developed canons of statutory construction. Tariff classification is purely an exercise in statutory construction, a task historically performed by reviewing courts.[5]

Where evidence of common or commercial

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[5]"It is well settled in Customs law that, when not otherwise defined in the [tariff schedule] or indicated by legislative history, the correct meaning of a term in a tariff provision is the common meaning understood in trade and commerce." *Schott Optical Glass v. United States*, 612 F.2d 1283, 1285 (C.C.P.A. 1979) (citations omitted). Although the "common meaning of a tariff term is not a question of fact but a question of law," "[i]n ascertaining the common meaning of a tariff term, the court may consult dictionaries, scientific authorities, and other reliable sources of information." *Id.* (citations omitted).

understanding, scientific meaning, or "principal use" are germane to tariff classification, the task of classification requires findings of fact — which the Court of International Trade is by statute compelled to make on the basis of a *de novo* record. An interpretive regulation and attendant deference may be appropriate to define a term that "has no well-defined meaning or common usage outside the perimeters" of a statute, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 476 (1979). By the same token, the judicial interpretation of a statutory term that is defined by its common meaning, rather than a meaning unique to the statute, should not be thus constrained. *Compare, Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 566-67 (deference was warranted where agency interpreted "high[ly] technical" regulations).

IV. Customs Rulings are Statements of Agency Enforcement Intent, Issued for the Guidance of Customs Officials and the Public, and are Not Legislative-Type Regulations Deserving of Judicial Deference

While requiring *Chevron*-type judicial deference to legislative regulations adopted pursuant to notice-and-comment rulemaking, this Court has consistently declined to extend such deference to agency rulings which are "not subject to the rigors of the Administrative Procedure Act." *Reno v. Koray*, 515 U.S. 50, 61 (1995). Informal agency interpretations and guidelines have consistently been held "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers," *Martin v. Occupational Safety and Health Review Comm'n.*, 499 U.S. 144, 157 (1991). While APA rulemaking by all Federal agencies is subject to strict procedural requirements mandated by Congress, including notice and comment (5 U.S.C. § 553), and direct judicial review to ensure that final rules are reasonable and in

accordance with law (*Id.*, Section 706), Congress has not imposed *any* requirements governing agencies' issuance of interpretive "rulings."

As a consequence, agency "rulings" programs vary considerably in scope, purpose, and the quality of the rulings issued. These variations, which stand in sharp contrast to uniform APA rulemaking procedures, explain why this Court has never accorded *Chevron* deference to interpretive rulings. Some agencies, such as the Internal Revenue Service, issue a relatively small number of interpretive rulings, all of which are written by the agency's headquarters office, and published in a single official publication of record. Customs, by contrast, issues thousands of rulings annually, in a sprawling, decentralized and often chaotic program whose operation shows precisely why *Chevron* deference is unwarranted and unwise.

The huge number of Customs interpretive rulings dwarfs the number issued by virtually any other Federal agency. As noted in the *amicus* brief of The Customs and International Trade Bar Association ("CITBA"), during the 12-month period from July 1998 to June, 1999, the number of Customs rulings issued was unofficially reported as 12,557 – 1,328 issued by Customs' Headquarters office (including 912 classification rulings) and 11,229 issued by the agency's field offices (including 10,986 classification rulings). In the same period, Customs Headquarters' Office of Regulations and Rulings ("OR&R") modified or revoked 165 such rulings.

The exact number of Customs rulings currently in effect is unknown, perhaps even by Customs itself. While Customs has a statutory duty to publish its rulings in the *Customs Bulletin*, or otherwise make them available for public inspection, (19 U.S.C. § 1625(a)), the agency has generally elected not to publish them,[6] nor to designate a

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[6]Customs' regulations (19 C.F.R. § 177.10(a)) repeat the statutory

private publisher of record. Several publishers offer unofficial compilations of Customs rulings. The July, 2000 edition of one unofficial publication, *Customs Info©*, published by Fuglei & Associates, contains 119,969 Customs rulings. (This number does not include the uncounted thousands of judicially reviewable protest decisions which Customs officers issue each year).

Given the sheer volume of Customs rulings, it is unsurprising that they are often not the product of thorough or expert legal interpretation. While Customs Headquarters rulings (about 10% of all rulings) are generally written by attorneys employed by Customs' ("OR&R"), and contain some degree of legal analysis, the vast majority of Customs rulings are prepared by the agency's National Import Specialist ("NIS") and Field National Import Specialist ("FNIS") staffs, who generally have no formal legal training. These rulings are often devoid of any discernible legal interpretation or reasoning, and are prepared under strict internal time constraints. *See* General Accounting Office, *U.S. Customs Service: Office of Regulations and Rulings Has Yet to Establish Performance Measures* (Testimony of JayEtta Z. Hecker to the Subcommittee on Trade, Committee on Ways and Means, House of Representatives), GAO-T-NSIAD-97-115 (noting that Customs had adopted, but not measured its compliance with, a 120-day time limit for the issuance of classification rulings by Headquarters, and a 30-day limit for the issuance of classification rulings by field offices).

The number of Customs rulings issued, and their

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command, but does not specify how, in the absence of publication in the *Customs Bulletin*, Customs makes rulings "available for public inspection". The regulation's statement that "[d]isclosure is governed by 31 C.F.R. Part 1, 19 C.F.R. Part 103, and 19 C.F.R. § 177.8(a)(3)," all of which refer to the Freedom of Information Act ("FOIA"), suggests that the initiation of a FOIA request by an interested party is the means by which Customs officially makes rulings available to public.

decentralized manner of preparation, strongly suggest that the rulings are intended as statements of agency enforcement intent and procedure, rather than as a body of administrative legal interpretation deserving judicial deference. Customs' program stands in contrast to the Revenue Rulings program administered by its sister Treasury Department agency, the IRS. During 1998 and 1999, respectively, the IRS issued only 62 and 58 Revenue Rulings. All of these rulings issued from a single body – the IRS' National Office – and were published in the *Internal Revenue Bulletin,* an official publication. *See* 26 C.F.R. § 601.201(6). Although this Court has held that APA-type agency regulations interpreting the Internal Revenue Code are entitled to *Chevron* deference, *Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998), it has pointedly ruled that IRS interpretative rulings "do not have the force and effect of regulations," *Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995), and has not accorded them *Chevron* deference.

While Section 625(a) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1625(a)) requires that Customs rulings be published in the *Customs Bulletin* or otherwise made available for public inspection, there is no official source to which the importing public can turn to consult or research such rulings. Customs does not publish its rulings officially, and has never designated a publisher of record; private publishing concerns offer selective, vastly different compendiums of Customs rulings.[7] As noted above *Customs Info©*, a CD-ROM service published by Fuglei & Associates, contains some 119,969 Customs rulings. As of August 15, 2000, Customs' internet website contained an unofficial compendium of 16,664 Headquarters Rulings and 48,568 "New York Rulings" (including Port Director rulings

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[7]Customs formerly made selected rulings available to the public, first in monthly booklets, and subsequently on microfiche and computer diskettes, but thereafter ceased all of these services.

made by the Field National Import Specialist staff). Other sources, such as LEXIS-NEXIS and Westlaw, have different numbers of Customs rulings in their databases.

Clearly, there is a "publications gap" between Customs' website and some of the commercial publications currently available. No compilation of rulings is official; none, apparently, is complete or comprehensive. This further undermines the notion that Customs rulings are a body of administrative lawmaking deserving of deference from the courts.

The available unofficial sources contain numerous unrevoked rulings which are either inconsistent with other rulings, superceded by subsequent judicial decisions, or both. For example, in *Customs Headquarters Ruling 088246 of November 30, 1990*, "hoodscarves," consisting of a length of acrylic knit fabric with a curved center seam, were classified by Customs under HTSUS subheading 6505.90.6080, as "hats and other headgear."[8] The ruling has never been revoked or modified, notwithstanding that, in *Totes, Inc. v. United States*, 16 Ct. Int'l Trade 796 (1992), the Court of International Trade ruled that an identical article was classifiable as a "scarf" under HTSUS heading 6117.[9]

Similarly, in *New York Customs Ruling 886130 of June 15, 1993*, and *Customs Headquarters Ruling 954758 of February 28, 1994*, the agency ruled that "taco shells" imported by Frito-Lay, Inc. were classifiable under HTSUS

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[8]*Customs Headquarters Ruling 088246 of November 30, 1990* was itself a result of the "modification" of *Customs Headquarters Ruling 086129 of March 6, 1990*, in which the hoodscarves were classified as knit scarves under HTSUS Heading 6117.

[9]Substantially identical rulings, issued to other importers, remain unrevoked, *See, Customs Headquarters Ruling 950559 of February 18, 1992; Customs Headquarters Ruling 085090 of October 11, 1989. Customs Headquarters Ruling 088201 of November 30, 1990; Customs Headquarters Ruling 085204 of October 11, 1989.* Indeed, on August 15, 2000, all of these rulings remained on Customs' website, and were also available in private publications.

subheading 1905.90.9090 as "other" bakers wares, and dutiable. Both rulings stand unrevoked, notwithstanding the Court of International Trade's unappealed decision in *Sabritas, S.A. de C.V.* and *Frito-Lay, Inc. v. United States*, 998 F. Supp. 1123 (Ct. Int'l Trade 1998), which classified the taco shells as "bread" under HTSUS subheading 1905.90.10, duty free.

Rulings remain unrevoked and unmodified even where Customs has changed its position on an issue without the benefit of judicial interpretation. Compare, for example, *Customs Headquarters Ruling 960556 of February 13, 1998* (classifying electronically-doped zinc sulfides under HTSUS subheading 3824.90.39) with *Customs Headquarters Rulings 950697 of February 19, 1992 and Customs Headquarters Ruling 950615 of January 22, 1992*, (both classifying electronically-doped zinc sulfides under HTSUS subheading 3206.50.00, and both of which remain unrevoked and unmodified).

Customs' failure to modify or annotate its rulings in response to court decisions or the agency's own change in position further indicates that the rulings are not intended as legislative-type interpretations of governing statutes, but rather as less formal statements of enforcement intent (in the case of pre-importation rulings) or administrative directions to Customs officers (in the case of pending transactions). Indeed, recipients of pre-importation rulings are required, under the Customs regulations, to include a copy of each ruling, or a reference thereto, with entry documents for the subject merchandise, to provide guidance to Customs officers concerning how the transaction should be handled. 19 C.F.R. § 177.8(a)(2). Customs Headquarters rulings concerning current or past transactions, such as Internal Advice Rulings, or Protest Review Decisions, are uniformly addressed to Customs officials at the ports(s) where the transactions are pending, who then take the actions specified in the rulings.

To the extent that rulings are intended as statements

of enforcement intent, or for internal guidance, there would be no need for Customs to revoke, modify or amend such rulings to reflect subsequent judicial actions. On the other hand, it would be bizarre to require courts to defer to an alleged body of administrative interpretation whose size, scope and accuracy cannot be established.

Limitations on importers' reliance on Customs rulings further refutes the notion that rulings are deference-worthy legal interpretations. Customs' regulations indicate that prospective rulings are issued "in the interest in the sound administration of the Customs and related laws," so that "persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation." 19 C.F.R. § 177.1(a)(1). Rulings may contain "with respect to a specifically described transaction, a definite interpretation of applicable law or other appropriate information." *Id.*

Customs rulings apply only to a specific "Customs transaction," that is, "an act or activity to which the Customs and related laws applies," which must be described in ruling requests "in sufficient detail to permit the proper application of relevant Customs and related laws." Once a ruling letter is issued, it represents "the official position of the Customs Service *with respect to the particular transaction or issue described therein* and is binding on all Customs Service personnel in accordance with the provisions of this Section until modified or revoked." *Id.*, Section 177.9(a) (emphasis added). Application of a ruling to an actual transaction is "subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction and the satisfaction of any condition on which the ruling was based". *Id.*, Section 177.9(b). Classification rulings apply "only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." *Id.*, Section 177.9(b)(2). Rulings, once issued,

are subject to modification or revocation without notice to any person except the person to whom the ruling was addressed. *Id.*, Section 177.9(c).

The Customs regulations expressly caution that no other person should rely on the ruling letter that *"or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter."* *Id.* (emphasis added). The fact that persons may not even assume that "the principles" of a ruling will be applied to any other situation confirms that rulings are not intended as definitive statements of the agency's legal interpretation. While binding on Customs officials, rulings do not limit the importer's ability to protest a Customs decision taken in accordance with, or in reliance upon, such ruling, nor do rulings limit an importer's power to seek judicial review of Customs decisions.

Customs rulings direct agency employees concerning how particular transactions are to be handled, but do bind the agency institutionally. Customs retains the power to change its legal views for any reason, and is not bound to follow the position taken in rulings when cases are presented for adjudication. Revocation or modification of a ruling rests entirely within Customs' discretion, and does not even require a predicate finding by the agency that the ruling is legally erroneous. "[A]ny ruling letter found to be in error *or not in accordance with the current views of the Customs Service* may be modified or revoked," 19 C.F.R. § 177.9(d).

Unlike APA-type legislative rules, which are binding on agencies and the public alike, Customs rulings may be freely disavowed by the agency in litigation. Customs' protest decisions (which presumably incorporate and reflect the agency's ruling concerning how a transaction should be handled) enjoy a statutory presumption of correctness when challenged in the courts. *See,* 28 U.S.C. § 2639(a)(1). However, in litigation, Customs can, and frequently does, abandon positions taken in rulings, raising alternative claims for classification under other provisions of the tariff. *See*

e.g., *Rollix Bearing Inc. v. United States*, 757 F. Supp. 1412 (Ct. Int'l Trade 1991)(alternate claims not entitled to presumption of correctness, but may be asserted). The agency is even free to assert a counterclaim, seeking a greater rate of duty than assessed in liquidation of the entry. *See, e.g.*, 28 U.S.C. § 1583. The fact that Customs rulings, unlike APA rules, can be "discarded at the courthouse door" at the agency's whim, further suggests that rulings are not binding interpretations of law entitled to deference.

Section 625(c) of the *Tariff Act of 1930* (codified at 19 U.S.C. § 1625 (c)), requires Customs to provide notice, in the *Customs Bulletin*, of the proposed and final revocation of rulings, to provide for comment by interested parties, and delays the effective date of new rulings for 60 days from their issuance. These requirements, however, do not transform even this limited subset of "revoked" or "modified" rulings into APA-type rules. Rather, they merely reflect Congress' acknowledgment that importers who have received a statement of enforcement intent from Customs in the form of a written ruling, and who have entered into transactions in reliance thereon, have a protectable reliance interest in such rulings, and should not be subjected to sudden or retroactive changes in treatment when rulings are modified or revoked.

Significantly, Section 625(c) does not provide any standards to guide Customs in determining whether to modify or revoke a ruling, but leaves the matter entirely to the agency's discretion. Unlike the APA, Section 625(c) does not provide for judicial review of the final ruling.[10]

The chaotic and disordered way in which Customs rulings are issued demonstrates why rulings in general, and

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[10]Judicial review is only available to the extent that the new ruling may be used as the basis for Customs' final disposition of a protest (in which case, the importer can seek *de novo* judicial review under 28 U.S.C. § 1581(a)) or in the very limited instances where pre-importation review is available under 28 U.S.C. § 1581(h).

Customs rulings in particular, do not deserve the mandatory deference prescribed by *Chevron* for administrative rulemaking which involves the exercise of legislative authority delegated by Congress. As an alternative to *Chevron* deference, the petitioner seeks a minimum of *Skidmore* deference or "respect" for its rulings.[11] *See*, Pet'r Br. at pp. 16-17, 31-33. The Court should find that Customs' rulings are not even entitled to *Skidmore* deference. Due to the manner in which Customs makes its rulings available to its own personnel and to the public, a *Skidmore*-type review is not possible; and, for that reason, this Court should find that Customs rulings are not entitled to such deference.

Skidmore deference presumes the ability of a court to determine the rationale for an agency's determination, the consistency of the agency's position, and the reasoning, if any, for an agency's change in its position. As a practical matter, for a court to perform that analysis, a formal body of rulings must exist. In that regard, this Court stated in *Skidmore*:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do *constitute a body of experience and judgment* to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control.

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[11]*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

323 U.S. at 140 (emphasis added).

As noted above, there is no official body of Customs rulings to which the Customs courts may apply a *Skidmore* analysis; no official, or even unofficial list, of the rulings exists. The agency's rulings are frequently conclusory, furnishing no legal analysis, and are not maintained in a current fashion. To require judicial deference to a body of administrative law assumes that the body of law can be identified and analyzed; this minimal condition cannot be satisfied in the case of Customs rulings. In short, the Customs ruling program offers a textbook example of why across-the board judicial deference to administrative rulings, whether under the *Chevron* or *Skidmore* iterations, is not appropriate.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully ask this Court to affirm the judgment of the United States Court of Appeals for the Federal Circuit.

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